No. 21121

IN THE

United States Court of Appeals For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

The appellee, in his Statement of Facts and throughout his brief, has erroneously or inaccurately stated as facts several items that must be corrected. The more important of these are as follows:

a) *The Polson-Jackson Joint Venture* (Appellee's Brief, p. 2; Appellant's Brief, p. 4.)

The statement that Jackson had not entered into any sales of land or timber or logging contracts with respect to Joint Venture property outside of the Rayonier-Jackson contract is not completely accurate. Jackson entered into a contract with Aloha Lumber Co. in 1956 with respect to logging an allotment, the timber on which had apparently been cut in trespass. (Def. Ex. A-18; Tr. 571-2) Also, Jackson executed an Easement Deed to the Forest Service, United States Department of Agriculture in 1960.

(Def. Ex. A-49; Tr. 569-70) This same error is repeated twice on page 23 and again on page 26 of Appellee's Brief.

b) *Nina Bumgarner* (Appellee's Brief, p. 3; Appellant's Brief, p. 7.)

The assertion that the contracts were merely to accommodate Mrs. Bumgarner was based upon Ex. 68 and 87, which are letters from the Bureau of Indian Affairs, on the testimony of John W. Libby of the Bureau of Indian Affairs (Tr. 373), on the testimony of Polson's employee and lawyer, Frank D. Beaulieu (Tr. 450, 464), as well as the testimony of L. J. Forrest and Wilton L. Vincent. There is no evidence to the contrary.

c) *Negotiations with Bureau of Indian Affairs* (Appellee's Brief, p. 5; Appellant's Brief, p. 10).

The Bureau of Indian Affairs was aware of at least one other transaction as Richard Bush obtained from the Bureau information concerning the Timber Cutting Contract dated June 14, 1956, between Jackson and Aloha Lumber Co. (Tr. 571-2)

d) *Events Prior to the Rayonier-Jackson Contract* (Appellee's Brief, p. 6; Appellant's Brief, p. 12.)

On page 7, appellee states that the 1951 Joint Venture Agreement provides "all proceeds were to be paid to Polson." This statement is erroneous as paragraph IV of the 1951 Agreement (Pl. Ex. 1) provides that "all proceeds thereof *as received* shall be paid to Polson." (Emphasis added) The Agreement does not state that the proceeds were to be received by Polson, and not even Polson contended at trial that it should be so interpreted. (Tr. 64) In fact, Jackson was the logical person to receive any proceeds from third parties as he was the managing partner and title to the real property was in his name, as was the Joint Venture bank account.

Correction of this inaccuracy is very important as ap-

pellee devotes entire paragraph G (Br. pp. 7-8) to this assertion, as well as a substantial portion of pages 28 and 30, most of page 43, and part of page 18.

e) *Investigation by Polson of Joint Venture Properties* (Appellee's Brief, p. 7; Appellant's Brief, p. 18.)

The two citations to the transcript (pp. 510 and 508) are to the testimony of John Kirkwood, the attorney for Anna Jackson, and do not support the statement that Polson did not acquire all material facts until July 1, 1961.

It is clear that the facts outlined in Appellant's Brief at pp. 18-21 were known to Polson and his agents by the dates indicated. Any information obtained by Attorney Bush was promptly reported to Polson. (Tr. 161) At no point in Appellee's Brief has Polson set forth any fact material to this lawsuit, of which he did not have full knowledge on or before April 15, 1961.

f) *Creditor's Claim and Demands Upon Jackson Estate* (Appellee's Brief, p. 8; Appellant's Brief, p. 22)

Mr. Bush, in his deposition of September 15, 1965, which was less than two months prior to the trial, did use the words "standing demand" when he testified as follows:

> "Well, from the time that we first knew of the amount of money that had been paid to Mrs. Jackson, there were, I'd say—there was a *standing demand*, really, for the payment of that money to us." (Tr. 566) (Emphasis added)

Mr. Bush's testimony at his deposition is quoted in full at pages 56-58 of Appellant's Brief.

The original Creditor's Claim (Def. Ex. A-19-E) did include a claim for the proceeds from logging on the Bumgarner Allotments. The reference in Appellee's Brief to page 582 of the transcript is to an unresponsive com-

ment by Mr. Bush in answer to a question by the court and concerned the Amended Creditor's Claim (Def. Ex. A-19-C), not the original Creditor's Claim (Ex. A-19-E).

REPLY TO APPELLEE'S BRIEF

PART I

Jackson Had Inherent or Apparent Authority to Execute the Rayonier-Jackson Contract and the Addendums (Appellee's Brief, p. 16; Appellant's Brief, p. 34)

In his discussion of authority, appellee has confused the doctrine of apparent authority of an agent with the statutory authority of a partner under Section 9 of the Uniform Partnership Act and has ignored the applicable sections of the Act, which Act is controlling with respect to the agency issues in this case. In addition, throughout Part I of his brief, particularly at pages 22-24, appellee argues that the Rayonier-Jackson Contract was "unique," and not "usual," ignoring the fact that contracting for logging of timber was one of the stated purposes of the Joint Venture (Pl. Ex. 1) and that of the 102 parcels of land that were acquired by the Joint Venture, 32 were subject to timber cutting contracts with either Rayonier or Aloha Lumber Company at the time they were acquired, which contracts were substantially similar in effect to the Rayonier-Jackson Contract.

Appellee places great stress upon what he contends was Rayonier's duty to inquire with respect to Jackson's authority. However, he ignores the knowledge that Rayonier and Indian Service personnel had acquired with respect to Jackson's role as managing partner, and further ignores the fact that Polson's employee, attorney Beaulieu, telephoned Forrest on the day after the contract was signed and inquired concerning the contract and logging plans. Would anyone be expected to make a further inquiry after receiving such a telephone call?

In Section 5 at page 25, appellee has misinterpreted appellant's contention that the Joint Venture was bound by Jackson's representations concerning Polson's knowledge and approval. The representations by Jackson were not statements concerning his authority, but were representations by him with respect to partnership affairs, such as whether he and his partner Polson were willing to contract to have the timber logged and on what terms and conditions. As such, the representations were within the scope of Section 11 of the Uniform Partnership Act, as quoted in full at page 43 of Appellant's Brief.

PART II

Regardless of Jackson's Authority Polson Ratified the Rayonier-Jackson Contract by His Conduct. (Appellee's Brief, p. 26; Appellant's Brief, p. 45)

A. *Ratification by Silence* (Appellee's Brief, p. 26; Appellant's Brief, p. 48)

By way of introduction, appellee states at page 26 that, "Basically, the rule that ratification *can* be inferred from silence is designed to protect innocent parties." The rule is to the contrary.[1] Appellee cites no authority for his statement but nevertheless premises his argument on it and attempts thereby to shift attention from his unexplainable conduct to an examination of Rayonier's conduct. For example, appellee implies at page 28 that Rayonier logged the Bumgarner Allotments because Jackson was an extremely valuable man to them as Chief of the Quinault Tribe (apparently forgetting that Jackson died several months prior to commencement of logging).

1. Restatement of Agency, Second.

"§ 92. Events Not Required for and Not Preventing Ratification:

"An affirmance by the principal of a transaction with a third person is not prevented from resulting in ratification by the fact:

* * *

"(f) that the agent or the other party knew the agent to be unauthorized;"

Also appellee criticizes Rayonier at page 30 for participating in or furthering an alleged deception because the Rayonier-Jackson Contract provided that proceeds would be paid to Jackson, repeating the error with respect to who was to receive proceeds discussed above at page 2.

Appellee places considerable weight on the case of *Myers v. Cook*, 87 W.Va. 265, 104 S.E. 593 (1920). The case, as quoted in *Mechem Outlines Agency, Fourth Edition*, page 145, is quoted and discussed at pages 30 and 31 of his brief. Appellee's quotations from the case and from *Mechem* are very misleading in their application to the present case. The court in *Myers v. Cook* stated in the paragraph that immediately preceded the statement quoted in *Mechem:*

> "There are a few decisions in which it has been broadly stated that mere unaided silence after notice is enough to prove ratification (citing cases). But in all of them additional elements are found. Moreover, the relation of principal and agent existed, and the unauthorized acts were acts in excess of authority, not the acts of strangers having no authority at all. *The distinction between the acts of agents and strangers,* in this connection, *is highly important . . . Where there is no relation of agency, and the act was done by a mere stranger or volunteer, and the circumstances impose no duty to speak, mere silence does not prove ratification.* (Citing cases) *Such is this case.*" (Emphasis added) *Myers v. Cook,* 104 S.E. at 595.

In addition, *Mechem* introduced *Myers v. Cook* with the statement that:

> "A few [cases] hold that there is in general no duty to speak and find no special factors creating such a duty." *Mechem Outlines Agency,* p. 145

and followed the discussion of the case with the observation that:

> "By and large, juries have found duty, and so ratification, where one who 'should in good conscience speak' fails to do so, and appellate courts have affirmed the finding." *Mechem Outlines Agency*, p. 146.

Furthermore, appellee concedes at page 32 of his brief that "If Rayonier had contacted Polson, and at that point he did not voice any dissent or objection, a far different situation would have existed." But appellee ignores the following:

a. Beaulieu, a lawyer and employee of Polson and the Joint Venture, telephoned Forrest of Rayonier and inquired whether the Rayonier-Jackson Contract would be recorded and when logging would commence.

b. Forrest provided the copy of the Addendum that was delivered by James Jackson to Beaulieu and in turn to Polson with Forrest's note of transmittal still attached. (Def. Ex. A-39-A, -C and -D)

c. Richard K. Bush, Polson's attorney, with full knowledge of all material facts, wrote letters (Def. Ex. A-57 and A-56) to Forrest concerning Cleveland Jackson and his affairs and made no mention of any irregularity concerning the Rayonier-Jackson contract or the logging on the Bumgarner Allotments by Rayonier. At approximately the same time Bush conversed with L. F. Marion, one of Rayonier's attorneys, concerning a possible meeting with Forrest to discuss Cleveland Jackson and his affairs and again made no mention of Bumgarner Allotments.

B. *Ratification by Conduct* (Appellee's Brief, p. 33; Appellant's Brief, p. 55)

1. *The Creditor's Claim* (p. 33)

As pointed out at page 3 hereof, appellee is in error in his citation to the comment of Mr. Bush as supporting his contention that the original Creditor's Claim (Def.

Ex. A-19-E) did not include a claim for the proceeds from the Bumgarner Allotments, as Bush referred to the Amended Creditor's Claim. (Def. A-19-C)[2]

Appellant submits that paragraph "(d)" of the original Creditor's Claim (Def. Ex. A-19-E), together with the testimony of Polson, particularly that in response to questioning by the court (Tr. 126), establish that the Creditor's Claim included the proceeds from the logging by Rayonier on the Bumgarner Allotments. By filing the claim with the Jackson Estate, Polson thereby ratified the Rayonier-Jackson Contract.

2. *The Standing Demand* (p. 34)

The testimony of Polson's attorney, Richard Bush, at his deposition less than two months prior to trial, is clear and unequivocal. This testimony is quoted at pp. 56-58, Appellant's Brief. In the words of Mr. Bush:

> "A. Well, from the time that we first knew of the amount of money that had been paid [by Rayonier] to Mrs. Jackson, there were, I'd say—there was a standing demand, really, for the payment of that money to us." (Tr. 566)

3. *The Lawsuit Against the Jackson Estate* (p. 37)

Appellee contends that the Complaint (Def. Ex. A-20-D) was drawn so that the contract proceeds were not included. Even a casual examination of the first three causes of action of the Complaint discloses that the proceeds from logging by Rayonier on the Bumgarner Allotments were prominently involved in each cause of action.[3]

Appellee attempts to avoid this difficulty by suggest-

2. In addition, attention is directed to the question by the court at page 580, Bush's answer at pages 581-83 and to the colloquy between court and counsel that followed at pp. 587-594. The gist of this colloquy is quoted in Appendix A to this brief.

3. See pages 58-9, Appellant's Brief, for a more complete discussion of the lawsuit.

ing that paragraph 1 of the prayer for relief was limited to real property. There is nothing in that paragraph from which such a limitation can be inferred. Furthermore, whether or not the contract proceeds were specifically included in the prayer of the Complaint is immaterial, as paragraph 4 of the prayer requests, in part, "such other and further relief as to the court shall appear proper." With such a general prayer for relief, the Grays Harbor County Superior Court had authority to enter any judgment consistent with the factual allegations of the Complaint, which allegations included three alternative causes of action involving the contract proceeds. As Professor Meisenholder stated in 32 Wash. Law Rev. 234 (1957):

> "Most complaints are now drafted to include a general prayer for relief. Such prayers will justify a judgment (other than a default judgment) in accordance with facts alleged in the complaint and the evidence."[4]

Appellee attempts to avoid the problem by urging at page 37 that the unresponsive narrative comment by his co-counsel is controlling, stating that the "only clear statement on this point in the record was by Mr. Bush, the 'author' of the complaint and the accounting." However, appellee ignores the following:

a. The testimony of Polson that he considered the $20,000 in contract proceeds to be a Joint Venture asset and that he made the allegations in the Complaint because he was entitled to have the funds paid to him pursuant to the 1951 Joint Venture Agreement; (Tr. 135-6)

b. The testimony, comments by the court, and the colloquy between counsel and the court that is set forth at pages 587 through 594 of the transcript, the relevant

4. Citing *Loutzenhiser v. Peck*, 89 Wash. 435, 154 Pac. 814 (1916) and *Salt v. Anderson*, 107 Wash. 149, 180 Pac. 873 (1919).

portions of which have been printed as Appendix A to this brief.

After examining the question by the court at page 580, Bush's response at pages 581-83, and the question, objection by appellant and the colloquy between court and counsel, as set forth in Appendix A, it is obvious that appellee erred in categorizing Bush's comment as a "clear statement" and in suggesting that the statement is controlling as "The appellant did not pursue it further. . . ." (Appellee's Brief, p. 37)

4. *Settlement of the Lawsuit* (p. 38)

In his discussion of the settlement and escrow agreement, as in his discussion of the creditor's claim and the lawsuit, appellee has not met the issues raised. The appellee, in the final paragraph on page 40, attempts to avoid the problem by suggesting that since the suit, settlement and escrow agreement took place after commencement of this lawsuit, the "subsequent actions to preserve the funds were obviously not a ratification of said contract." Such an assertion ignores the general rule suggested by Section 97 of the Restatement of Agency, Second, which is quoted in full at page 59, Appellant's Brief.

PART III

Polson Is Estopped to Deny the Validity and Enforceability of the Rayonier-Jackson Contract (Appellee's Brief, p. 40; Appellant's Brief, p. 63)

1. *Full Knowledge of All Material Facts* (pp. 40-42)

Appellee places great reliance upon the portion of Finding of Fact No. 4 (R. 335) that Polson "did not have full knowledge of all material facts regarding the [logging] contract until July of 1961." An examination of the testimony cited by the appellee at page A-1 of the Appendix to his brief in support of this portion of the finding

(which Finding was Specification of Error 1.1) discloses no evidence to support this finding. To the contrary, the testimony of Polson and Bush, his attorney, establishes conclusively that Polson had full knowledge of all material facts concerning the logging contract not later than April 15, 1961. Any information obtained by Bush was promptly reported to Polson. (Tr. 161) The dates by which Polson had knowledge of each fact are outlined at pages 18-21 and 48-50, Appellant's Brief, and appellee cites no material fact of which he did not have full knowledge on or before April 15, 1961.[5]

2. *Intent to Mislead* (p. 42)

The Washington rule with respect to the elements of estoppel by silence is apparently unclear. To be contrasted with the 1916 Washington case quoted by the appellee at page 41 is the statement by the court in *Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 700-1, 44 P.2d 785, 787 (1935), that:

> "If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent. This rule of estoppel is applicable where the owner of property stands by and knowingly permits another to expend money upon it by making improvements, erecting buildings, and the like.
>
> "In 2 Pomeroy's Equity Jurisprudence, §818, under the heading of Acquiescence as an Estoppel to Rights of Property or of Contract, it was said:
>
> "'Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a

5. In fact, the Washington court has stated that either actual or constructive knowledge is sufficient for estoppel. See *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 114, 228 P.2d 121 (1951). Polson had constructive knowledge of all the material facts well before April 15, 1961. For example, information with respect to the Rayonier-Jackson Contract was included on the Schedules that Beaulieu prepared in August, 1960. See Def. Exs. A-1 and A-14.

> party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.'"

See also *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 114-115, 228 P.2d 121 (1951), which sets forth the general rule in Washington with respect to estoppel and cites with approval the *Harms* case.

In addition, the *Blanck* case cited by appellee at page 41 is inapplicable because it rests upon "mere silence, without positive acts," ignoring the following: (a) Beaulieu's telephone call to Forrest inquiring with respect to the Rayonier-Jackson Contract and when logging would commence; and (b) Bush's letters to Forrest (Def. Ex. A-56 and A-57) and his telephone call to L. F. Marion with respect to Cleveland Jackson and his affairs.

3. *Polson's Silence Did Mislead and Prejudice Rayonier* (p. 42)

Appellee argues at pages 42-3 that obviously Rayonier was not relying upon the contract being a valid contract with the Joint Venture. But, query, with whom did Rayonier think it was contracting when it negotiated with the managing partner and discussed the completed contract with Polson's lawyer—employee Frank Beaulieu? If Rayonier was not relying on a valid contract, why did it expend considerable sums to build roads? Why did it log the property? And why did it make over $22,000 in payments to the Bureau of Indian Affairs and the Cleveland Jackson Estate pursuant to the contract? Appellee at page 3 suggests ulterior motives on the part of Rayonier and

comments at page 28 that Jackson was a valuable man to Rayonier. However, Jackson had been dead for two months when the logging commenced. If, as appellee insinuates, Rayonier contracted with Jackson to keep his "valuable" friendship, then why did it commence logging and perform under the contract after his death? Obviously for the reason that it believed it was acting under a valid contract.

Appellee suggests that Rayonier was not prejudiced because of anything that occurred after July 1, 1961. Assuming for purpose of argument that Polson did not have full knowledge until July 1, 1961, appellee nevertheless ignores the fact that substantial payments were made after July 1, 1961, by Rayonier to the Bureau of Indian Affairs for administrative services pursuant to the Addendums, and that over $12,000 in payments were made by Rayonier after that date to Anna Jackson, as Executrix of the Jackson Estate, pursuant to the Rayonier-Jackson contract.

Rayonier received no setoff or credit for the payments to the Bureau of Indian Affairs. With respect to the payments to the Jackson Estate, Polson suggests that appellant has not been prejudiced as the court allowed a setoff. Such an argument ignores the following: (1) Rayonier obtained the right of setoff only after a contested court hearing and over the vigorous and prolonged opposition of Polson's attorneys; (2) Rayonier lost the use for over five years of the payments it had made and the proceeds earned no interest for the three years they were in Polson's escrow.[6]

At page 43 appellee again misstates the Joint Venture Agreement provision as to who was to receive sale

6. Consequently, although Rayonier was allowed a setoff, it had only $20,000 to set off against claimed damages that increased over the five years from $23,000 to $30,000 ($23,000 actual damages together with the five years' interest at 6% per annum that was awarded by the court).

proceeds. In addition, appellee cites no authority, business or legal, for the statement that the payments, in the ordinary course of business, would be made to Polson, not the Executrix of Jackson's Estate. Polson and his attorney were fully aware that the payments were being made by Rayonier to Jackson's Executrix and at no time requested that Rayonier send them to Polson instead.

PART IV

The Cutting of Timber By Rayonier Was Not a Trespass or Waste (Appellee's Brief, p. 44; Appellant's Brief, p. 67)

Appellee, in his heading to Part IV, page 44, states that Rayonier violated either the treble damage trespass statute or, in the alternative, the treble damage waste statute. Appellee does not discuss how Rayonier could have violated the treble damage waste statute and fails to respond to that portion of appellant's brief (p. 78) that discussed the question.

Further, in his discussion of waste in Part IV, appellee has apparently confused three separate concepts of waste:

(a) the statutory treble damage action for waste under R.C.W. 64.12.020;

(b) the cause of action in those states that have either enacted or adopted as part of their common law the English Statute of Westminster II or its equivalent. See Vol. 2, American Law of Property, § 6.15, p. 64;

(c) a common law action that he claims exists in Washington allowing actions for waste between cotenants in fee.

The statutory treble damage action under R.C.W. 64.12.020 is discussed in Appellant's Brief at page 78. From that discussion, it is clear that Rayonier did not violate the waste statute by its logging. Appellee must concede that the waste statute would be inapplicable to any logging by Nina Bumgarner.

The Statute of Westminster II has not been enacted in Washington and was not included within the scope of the waste statute that was adopted by the Washington legislature. The Washington court has not adopted the statute or its equivalent. There is neither statutory nor common law basis in Washington for an action in waste based upon this Statute. See *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76 (1891).

Therefore, it must be the third concept of waste upon which appellee bases his argument that if Nina Bumgarner had logged without the consent of the Joint Venture, she would have committed waste. Appellee argues that what Nina Bumgarner could not legally do, she could not legally license Rayonier to do. Accordingly, argues appellee, Rayonier acted "without lawful authority" and committed a trespass.

Even if it is assumed for purpose of argument that the Rayonier-Jackson Contract was invalid and that Joint Venture consent was required, we point out that such consent was given. We also point out that it is not unlawful in Washington for a cotenant in fee to cut mature timber; that Nina Bumgarner could and did legally license Rayonier to cut the timber on the allotments; that Rayonier did not violate the trespass statute when it cut the timber; and that whether or not the Joint Venture consented to the Rayonier-Bumgarner contracts is immaterial.

A. *Joint Venture Consent Was Given*

As discussed above, appellee contends that Nina Bumgarner and her licensee-purchaser Rayonier could not lawfully log without the consent of the Joint Venture. Appellee incorrectly assumes that consent was not given, and his assumption is based on the premise that the only way by which the Joint Venture could consent was by a valid contract between Rayonier and the Joint Venture. Appellee cites no authority for this premise.

Whether or not Joint Venture consent was required, such consent was, in fact, given to the Rayonier-Bumgarner Contracts and to the logging by Rayonier as the licensee-purchaser from Nina Bumgarner.[7] This consent by the Joint Venture is demonstrated by the following acts in writing whereby it manifested its consent to the Superintendent, Western Washington Indian Agency, who was acting on behalf of Nina Bumgarner:

a. Jackson's letter of May 15, 1959 (Ex. 93) agreeing to have Rayonier log one of the Bumgarner Allotments, which letter was in response to a letter dated May 12, 1959, from the Superintendent. (Ex. 92)

b. Jackson's letter of June 18, 1959, to the Western Washington Indian Agency (Ex. 95) rejecting a proposed partition and agreeing to have Rayonier log.

c. Beaulieu's letter of June 18, 1959, to the Western Washington Indian Agency (Ex. 96) suggesting that Rayonier be allowed to log the allotments.

d. Jackson's affirmative response to a letter of June 24, 1959, from the Superintendent (Ex. 97) (a copy of which was sent to Beaulieu), whereby Jackson executed the two Addendums (Pl. Ex. 9 and 10) and forwarded them to the Western Washington Indian Agency.

e. The execution by Jackson of the two Addendums. (In this connection, it should be pointed out that appellee failed to respond to that portion of Appellant's Brief (pp. 36-45) that discussed Jackson's authority vis-a-vis the Indian Agency and the validity and effectiveness of the Addendums.)

As the Joint Venture did consent to the Rayonier-Bumgarner Contracts, appellant, as the purchaser under said

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7. Appellee erroneously substitutes Polson for the Joint Venture as Nina Bumgarner's cotenant throughout Part IV of his brief. The Joint Venture was Nina Bumgarner's cotenant—not Polson.

contracts, did not and could not, as a matter of law, commit a trespass.

B. ***Joint Venture Consent Was Not Required***

As discussed above, the gist of appellee's argument is that Nina Bumgarner could not have legally cut the timber on the two allotments without Polson's consent. Appellee must concede that Nina Bumgarner would not have been subjected to a treble damage claim under the trespass statute (R.C.W. 64.12.030), or the waste statute (R.C.W. 64.12.020) if she personally had logged without his consent as neither statute is applicable to a tenant-in-common in fee. The Joint Venture's remedy for such a cutting would be an accounting. However, appellee argues that although Nina Bumgarner herself could cut and only account, nevertheless it would be waste and that anyone to whom she sold the timber or licensed or hired to cut the timber would not be entitled to cut and account, but must pay treble damages.

The appellee cites several cases from other states (pp. 48-49) where the courts have stated that the cutting of timber by a cotenant is waste. However, as he concedes, in most states the remedy is an accounting, not tort damages. An example of this is *Clark v. Whitfield,* 213 Ala. 441, 105 So. 200 (1925), which is cited by appellee at page 48, footnote 1, for the proposition that cutting by a cotenant is waste. In that case the court quoted a rule that previously had been adopted in several cited Alabama cases, as follows:

> " 'If a tenant in common receives more than his share of the profits, by an excessive use of the property, as by wearing out the land, or by an improper use of it, as by cutting down the timber and selling it, he cannot be treated as a tort-feasor, but the remedy of the cotenant is by an action of account, or a bill in equity for an account.' " 105 So. at 205

Appellant is not urging a unique theory in suggesting that Joint Venture consent was not required and that Rayonier did not commit a trespass when it logged the two allotments. This is precisely the conclusion that the Rhode Island court reached in the *Buchanan* case[8] that was discussed by appellant at pages 71-77.

At page 50 appellee attempts to distinguish the cases cited by appellant on the basis that the timber was treated by the court as personalty in each case, as contrasted to Washington, where standing timber is realty. Although the *Buchanan* case cited by appellant treated the timber as a part of the revenue of the cotenancy, the *Kirby Lumber* case[9] did not, and in addition, in each of the states involved, including Rhode Island, standing timber, absent a contract of sale, is considered realty, just as it is in Washington.[10] Further, in Washington the rule with respect to standing timber conveyed distinct from the land is unclear. To be contrasted with *Dowgialla v. Knevage*, 48 Wn.2d 326, 294 P.2d 393 (1956), which is cited by appellee at page 50, is the more recent case of *Leuthold v. Davis*, 56 Wn.2d 710, 355 P.2d 6 (1960), where the court stated:

> "Where, as here, title to the timber is conveyed or reserved distinct from the land, the timber becomes personal property separate from the land." 355 P.2d at p. 8.

There is neither statutory nor common law basis in Washington for an action of waste between cotenants and

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8. *Buchanan v. Jencks*, 38 R.I. 443, 96 Atl. 307 (1916).

9. *Kirby Lumber Co. v. Temple Lumber Co.*, 125 Texas 294, 83 S.W. 2d 638 (1935).

10. *Ozan Lumber Co. v. Price*, 219 Ark. 709, 244 S.W.2d 486 (1952); *Carnahan v. Terrall Bros.*, 137 Ark. 407, 209 S.W. 64 (1919); *Fish v. Capwell*, 18 R.I. 667, 29 A. 840 (Timber is real property until it is subject to a contract of conveyance); *Davis v. Conn*, (Tex. Cir. App.), 161 S.W. 39 (1913) (Same).

neither Nina Bumgarner nor Rayonier committed waste or trespass. In fact, there are several recent decisions involving adverse possession between cotenants where the Washington court has stated the general rule that "the entry of a cotenant on the common property, even if he takes the rents, cultivates the lands, or cuts the wood and timber without accounting or paying for any share of it, will not ordinarily be considered as adverse to his cotenants and an ouster of them." *McGill v. Shugarts*, 58 Wn.2d 203, 204, 361 P.2d 645 (1960).[11]

PART V

Only Single Damages (if any) Should Have Been Awarded, (Appellee's Brief, p. 55; Appellant's Brief, p. 80)

Considering all the circumstances of this case, particularly the conduct of Polson, the activities of Jackson as the managing partner, and the fact that Polson's employee-lawyer Beaulieu contacted Rayonier concerning the contract the day after it was executed, the award of treble damages to Polson was not only clearly erroneous, but is a miscarriage of justice.

Treble damages are not appropriate under R.C.W. 64.12.030 where the owner knows of the logging and re-

11. See also Vol. II, American Law of Property, § 6.15, pp. 64-66, where Dean Russell Niles and Professor William Walsh conclude: "The English courts have held that the same standard [for waste] cannot be applied to life tenants or tenants for years as to co-owners in fee, since each co-owner has the right to use and enjoy the common property in any reasonable way, so long as he does not exclude his co-tenants from a like use and enjoyment. Since a co-tenant of an estate in fee may make such reasonable use of the property as any owner of a fee simple estate, he may cut trees which are mature and fit for cutting. . . . In a considerable number of American cases dealing with mines, quarries, oil lands, and timber, there is, however, hopeless confusion. . . . It is submitted that the position of the English cases is entirely sound, and that the reasonable use of the property by a co-owner in fee, in order to receive the fullest benefits therefrom, cannot rightly be treated as waste under the statutes which have re-enacted the Statute of Westminster II." (Footnotes omitted)

mains silent, for one of three purposes of the statute is abused in such a case. If damages were to be awarded, the trial court should have mitigated the damages under R.C.W. 64.12.040 or held Polson to be estopped by his conduct to recover more than single damages.

PART VI

Polson's Recovery Is Limited By Reason of Jackson's Interest in the Joint Venture, (Appellee's Brief, p. 57; Appellant's Brief, p. 81)

In his discussion appellee has completely confused Jackson's right to a one-half interest in any profits with Polson's right to be repaid by Jackson from these profits. From the 1961 Joint Venture Tax Return (Def. Ex. A-45) that was filed by Polson in early 1962, it is clear that Polson himself considered that Jackson had a one-half interest in the profits. This same approach was taken by Polson in the accounting that he filed in the Jackson Estate (Def. Ex. A-19-D). Jackson's misappropriations were known by Polson when he executed the Tax Return and Accounting, and in each of them he treated Jackson as having a one-half interest in the profit. As outlined in Appellant's Brief, at page 84, there was a substantial profit from the Bumgarner Allotments and Jackson had a one-half interest in it.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

At pages 587-89 the following occurred:

Question (By Mr. Howard to Witness Bush)

"Now, having reviewed those paragraphs [referring to paragraph 11, page 4, paragraph 4, page 6, and paragraph 4, page 8, of the Complaint, Def. Ex. A-20-D] would you please explain for the court why you can make the statement that this suit did not constitute a claim for those funds?

"MR. BEIGHLE: I object to that question. I think the complaint speaks for itself.

* * *

"MR. HOWARD: Your Honor, I am willing to have him refer there specifically to the complaint and explain the basis for his action or his statement in light of the statements in the complaint.

"MR. BEIGHLE: The court ought to interpret the complaint.

"THE COURT: Ultimately that will be my duty to do so.

"Is there any area of fact as distinguished from interpretation?

"MR. HOWARD: I believe there is, your Honor.

"THE COURT: If there be some area of fact that bears upon the interpretation of the paragraphs of the complaint in question, you may bring that out.

* * *

"MR. HOWARD: Perhaps I can clarify this for the Court.

It will be our contention that there is no mention, and the moneys are not included in any manner in the prayer for relief, and that is determined by examining and explaining the accounting, which is referred to in the paragraph for relief."

Then at pages 589-93, the Judge commented as follows:

"THE COURT: Well, now, if this is something

which can be derived from the complaint itself, that is a matter of argument.

"If there is some fact matter pertaining to it, this is another question. That is why I said if there is some area of fact as distinguished from argument or opinion or individual interpretation or the like, it is a rather odd situation presented. . . . (Tr. 589)

"I think there must be some explanation of this situation that goes beyond merely the interpretation of the document.

"But if there is not, and it cannot be demonstrated from the document itself, of course, there in nothing —no occasion to have Mr. Bush testify about it.

"One of the reasons that I am hesitant about having Mr. Bush testify about it is because of the fact that we have made it plain that he should not argue any matters as to which he testifies, and I don't want to go into the guise of having a witness presenting an argument concerning the subject matter. But that is why I am trying to emphasize that.

"If there is some element of fact relating to this interpretaton of the document that does not appear upon the face of the document itself, I will permit to that extent, whatever this witness may say about it.

"If you would like to have a little conference between yourselves to determine what your position as to that is, I am perfectly willing to take a recess at this time." (Tr. 591-2)

After recess, Mr. Howard advised the court as follows:

"Mr Howard: My apologies to the court for the problems that arose recently. I was involved with a problem that had a complex nature of accounting, and I think I, having reviewed it, feel it can be presented in the documents and will not press this point any further.

"The Court: Very well." (Tr. 593)